No. 2508

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United States Circuit Court of Appeals

For the Ninth Circuit.

THOMAS ANDREWS, alias THOMAS J. MURPHY, and GEORGE POOLE, alias GEORGE MOORE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief for Plaintiffs in Error

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Reply Brief for Plaintiffs in Error

Replying to the brief filed by the attorney for Defendant in Error, we desire to briefly touch upon first, the statements therein contained which are erroneous and rectify the same; second, to comment on such points which we consider need to be controverted, or explained; third, to reiterate our original position as set forth in our opening brief.

On page 10 of the said brief filed in behalf of Defendant in Error, paragraphs 2, 4 and 6 on said

page and paragraph 1 on page 11, the reference is to Andrews or Murphy instead of Poole as therein set forth. Further on page 11 in the last paragraph on said page counsel for defendant in error states: "I need not dwell further, except to say that counsel in his brief admits the overt act of purchasing the ticket, and this it would seem is sufficient (Brief, p. 17)".

It will be seen by referring to our original brief that we make no such admission. What we do say is that certain circumstantial evidence was adduced during the trial to the effect that Andrews, or Murphy, as he is known, did come from Trinidad to San Francisco. We further state in this connection that there is no proof that he had contraband opium in his baggage.

Counsel for Defendant in Error in his argument on pages two and three of his brief does not in our opinion fully grasp our point. It is our contention that under the theory assumed by the pleader in drawing the indictment in this case, it would be possible to charge a conspiracy to import opium, a further conspiracy to receive opium after importation, a further conspiracy to transport opium, a conspiracy to buy or sell the same, and a number of other charges might be predicated on the same theory, and each one be a separate and distinct conspiracy; further, that the testimony adduced during the trial under the same set of overt acts in this manner might be applied to a dozen counts, and by cumulation of the penalty a defendant might be

subjected to twenty or more years of penal servitude. This syllogism carried to its logical conclusion would be a reductio ad absurdum. Our contention is that there is either one conspiracy to violate the opium act, to-wit, the Act of February 9, 1909, and the direct crime of the substantive offense resulting from a violation of the said act, and further that if the Government, Defendant in Error, desires to prosecute an action against the plaintiffs in error there must be charged first, a distinct violation of section 5440 of the United States Statutes, also set out in substance in section 37 of the Penal Code of the United States, and second, in a separate and distinct count in the indictment a charge alleging in direct, concise and specific terms a violation of the opium act itself. There is no question but that there may be a conspiracy to commit an act prohibited by the United States Statutes and also that where the acts complained of are similar in their nature that there may be charged in a separate count in the same indictment a violation of the act itself. The objection which we have to the indictment itself is that it purports to charge a conspiracy in the first count to import opium, and in the second count a conspiracy to transport and sell opium after importation, with four indentical overt acts in support of two alleged conspiracies, when as a matter of fact if any crime is committed there can be in the very nature of the offense as charged but a single conspiracy, to-wit, that of confederating and conspiring together to violate the provisions of the Act of February 9,

1909,and if,as charged in said indictment all the acts and deeds of plaintiffs in error in carrying out said conspiracy were continuous, we maintain there can be but one single conspiracy and not two conspiracies as the said indictment attempts to set forth. Further, if there be but one conspiracy and all acts done by the plaintiffs in error were continuous and for the purpose of carrying out their original alleged confederation, then in the very nature of the said acts it can be seen that there is, if anything, but a single conspiracy, and not two. If this be so, then we maintain that the indictment is defective. Just at this point a pertinent inquiry arises, namely, if, as we contend, but one conspiracy exists, then under which count of the indictment as it stands is the conspiracy to be taken as charged? Further, assuming for the sake of the argument only that a conspiracy has been proven, then under which count has it been proven, that is to say, if this matter were presented to the jury in the form of a question thus, "You may only find the defendants guilty under one count, then under which count will you find them guilty"? This question is now impossible of an answer. Therefore we contend that plaintiffs in error are entitled to a reversal. But we have a further objection to make, viz., that in neither count of the said indictment is there a violation alleged of the provisions of the opium act of February 9, 1909, in such form and manner as is required by law to fully charge a separate and distinct offense. Under section 1024 of the Revised Statutes which has already been quoted by counsel

for Defendant in Error as well as by counsel for plaintiffs in error in their original brief, it will be seen that crimes of the same class may be properly joined in separate counts in the same indictment. The very fact that there is such a provision in the Revised Statutes in our opinion makes it clear that the means have been provided whereby clarity and conciseness may be obtained, and that such is recognized by direct statutory enactment. It will be seen by close analysis of the very case cited by counsel for Defendant in Error on page 5 of his brief that the offenses alleged were for acts connected together but set forth in different counts in the same indictment. In the case which we have cited in our opening brief, to-wit, U. S. vs. Lancaster, 44 Fed. Rep. 885, 894, the rule is announced that counts charging a conspiracy, and also the offense committed in pursuance thereof may be joined. This particular case and also the case of Logan vs. U. S., 144 U. S. 263, 295, cited by counsel for defendant in error on page 5 of his brief, are cases in which Sections 5508 and 5509 of the Revised Statutes are involved and in both instances in these two cases there was a conspiracy to interfere with certain rights of the individual, and growing out of said conspiracy a murder was committed, which was a direct violation as we have stated of said sections last above named. These two sections are construed together, and provide punishment for a conspiracy, of this kind, and further punishment for a crime committed in furtherance of said conspiracy. In these two cases which we have just

cited it will be seen that in both indictments there was a full and complete allegation and statement charging not only conspiracy, but the crime of murder, as required by law. In this present case under discussion, an analysis of the indictment we maintain does not show any such compliance with the requirements of good pleading, and as it is the foundation upon which both Defendant in Error and plaintiffs in error must stand, we again insist that these plaintiffs in error should have been permitted to file a demurrer to the indictment in order that the issues might have been properly joined, and that at the trial of the case a proper and orderly defense might have been interposed, first, to a conspiracy charge of violating the opium act, and second, to a direct charge of violating the opium act itself, and that both charges should have been set forth in separate and properly alleged counts in the same indictment.

On pages 6 and 7, the brief of counsel for Defendant in Error touches upon the instructions given by the court to the jury. Our position, which we have already set forth in our opening brief, is, that the instructions complained of having been given by the court to the jury, which said jury had before it certain evidence assuming the existence of certain alleged opium in Nogales, Mexico, and further that said alleged opium was brought across into the United States from Mexico, and thence to San Francisco, were wrongfully given. The jury must have been so impressed with the fact that no evidence was offered by these defendants in the court below,

plaintiff in error here, to explain the said alleged possession of opium in Nogales, Mexico, and this fact taken with the instructions that possession unexplained was an evidence of guilt, it was only natural for the jurors' minds to arrive at a conviction upon which to predicate a verdict of guilty without any further consideration whatsoever. Our position is that it is a very material difference whether or not there is a conspiracy to violate the opium act or a direct violation of the same. And while the instructions complained of would be perfectly proper in a charge made pursuant to a proper indictment for a violation of said opium act, the charge is entirely improper when applied to a conspiracy under Section 37 of the Penal Code, to-wit, an agreement to violate the Act of February 9, 1909. So far as the brief of counsel for Defendant in Error on pages 7 to 13 is concerned, we again assert what we have heretofore set out in our brief, viz., that much of the evidence introduced was improperly allowed to go before the jury because there was no proof of the importation of opium, and if the theory of the government is that these plaintiffs in error are being tried for a violation of the opium act without proof of importation, then the evidence which was introduced is surely erroneously presented to the jury over the objections of counsel and properly excepted to, as shown by the record.

On page 12 of said brief counsel for Defendant in Error states that it is not necessary to show the formation of a conspiracy in May, 1913. Further on in paragraph 3 on the same page, he further states that

under the conspiracy charged it is not even necessary to prove that a single tin of opium was ever bought or sold. We maintain that under the decisions quoted in our brief, that in order to convict on the charge of conspiracy there must be proven three particular elements, first, the unlawful agreement or confederation, second, the overt act, and third, that the defendants were the conspirators (pages 11, 12, opening brief, plaintiffs in error and authorities cited on page 12) and if these three elements are not combined, conviction is wrongful. Said counsel also in discussing the evidence, on page 8 of his brief argues that Louis Sang sent certain money to Poole for the purchase of twelve cans of opium. It is shown by the testimony of Sang that he never received any opium from Poole at any time subsequent to said date. Further than that, all matters pertaining to transactions between Poole and Sang prior to May 1, 1913, have nothing whatsoever to do with this case. In passing, we might refer to the statement made by counsel on page 13 of his brief, in paragraph 2, relative to the question of no proper exception having been taken to the charge to the jury at the proper time. We believe that where there is a substantial violation of the rights of a defendant, and that where some foundation is laid, it is proper for this court to consider the matter on an appeal. See Wiborg vs. United States, 163 U. S. 658, as quoted in our opening brief on page 26.

On the question of newly discovered evidence we are not in a position to read the mind of counsel trying the case, nor are we trying to advance any reas-

on why the evidence suggested by the affidavits of Sauer and Paulino Fontes and the others was not produced at the trial. We do, however, maintain that in connection with the rest of the evidence in this case and the instructions of the court to the jury, that this evidence was such that it would have explained to the jury what became of said cases of alleged opium, and would have made a vast difference in the result of the trial.

In closing our case we desire again to advert to our original position and to amplify it a little further by asking, If the conspiracy statute provides a punishment of two years, and if the plaintiffs in error were convicted of a conspiracy, could the punishment be more than two years when it is not shown whether they were convicted of the commission of a direct violation of the opium act itself as well as of a conspiracy to violate the provisions of said act? We would respectfully suggest to the court these two things, first, was the indictment sufficiently clear and did it charge one or more offenses in a proper manner; second, did the defendants in the lower court, the plaintiffs in error, have a fair and impartial trial? All of which we respectfully submit.

Dated, San Francisco, Cal., April 2, 1915.

Wm. F. Rose and Bruce Glidden,
Attorneys for Plaintiffs in Error.